administrative care. In this connection M. Von Hamel recommended a conservative position: the adoption of the principle of conditional liberation as a preparation for the possible future establishment of the indeterminate sentence. By means of conditional liberation we may be able to determine in a particular case whether the amendment of the delinquent has been attained, provided, of course, that the individual so liberated be not thrown upon the street, but placed in an environment of such a simple character that he may be able to adapt himself to it. In all of this Attorney-General Von Hessert of Darmstadt concurred.

At its conclusion the congress by vote adopted the following theses:

First: "Hardened and professional criminals, recidivists, who present a grave danger to society, must be deprived of their liberty for as long a time as they are dangerous to the mass. Their liberty should be as a general rule conditional."

Second: "In the case of criminals whose crimes issue from a lack of social adaptability, strictly determined punishment should be replaced by an indeterminate penalty which should be executed according to the progressive system. The liberty of the criminal should be protected (a) by the establishment of the maximum penalty; (b) by the composition of the commission of liberation, the majority of which should be composed of independent judges."

Finally, acting on the proposition of M. Aschaffenburg, the congress decided to address to the commission charged with the revision of the penal code the view that "in the next German penal code conditional liberation should be treated not by the judicial administration but by a special commission, of which a physician who has studied psychiatry, and at least one judge should form a part, and that this commission should at the same time make tests to the end of determining the possibility of introducing the indeterminate sentence."

One is impressed with the paucity of discussion of strictly anthropological problems in this congress. The report of Professor Klaatsch upon the results of his investigations of primitive Australian races, and that of Rosenfeld on the connection of race and criminality, aroused relatively little discussion. This is, perhaps, to be expected, inasmuch as these are relatively highly specialized fields of research.

ROBERT H. GAULT.

THE LIMITS OF COUNSEL'S LEGITIMATE DEFENSE.

Out of the many issues and sensations concentrated in the McNamara dynamite murder case there arises one emphatic question which dominates all others for the thoughtful student of our criminal

procedure. It is this: What are the limits of legitimate defense which counsel may use for an accused?

If we can answer this we put our finger on one of the marked excesses of our present practice. Theoretically, the accused's counsel acts to secure a fair trial for his client, and therefore to free the latter if he is innocent. Practically we know that the regular criminal practitioner fights to free his client, guilty or innocent. There is here no discrimination between the rich or the poor offender, the hitherto respectable or the hitherto under-world man—the Hines and Walshes, or the McNamaras and Ruefs. Their counsel fights to the last ditch. Can the law and the community afford to permit this? Is there no way of putting a limit on it? For it is surely breaking down our system of criminal justice. It tends to foster the technicality so much censured. It forces the State prosecutor to fight equally without scruple. It drives almost all honorable lawyers out of a field where duty calls them and the community needs them. It is one of the most repulsive features of our present system.

Is there no relief? Must we wait for a new generation slowly to bring a radical change of thought and custom? Will the institution of a State defender (to oppose the State prosecutor) furnish a speedier solution? These are troublesome questions which must be answered before long.

But the McNamara case has brought out in an emphatic way the extreme unmorality of the system. It has shown us that even the atrocity and cold inhumanity of a brutal crime may make no recoil in this class of criminal defenders. In many classes of crime it is easy to see that there is some sort of a way for the defender to persuade himself that he is defending a meritorious cause, even if not a law-abiding man. This is obvious enough in the everyday cases of weak tempted lads or of ambitious magnates of finance; a high-minded counsel, for example, in the Standard Oil case of three years ago was heard by the writer to express in the most passionate terms his sense of the outrage of that persecution. But here in the McNamara case we have crossed the line of honest differences of sympathy and prejudice. Whoever did dynamite the Los Angeles Times building, crowded with human beings, did a brutal murder, did he not? He deliberately killed a score of defenseless beings, under circumstances which have never been regarded as anything but plain murder outside of the tenets of Machiavelli or the Hindu thugs or Stevenson's dynamiters. Now we know who did it. But *Clarence Darrow knew it from the first.* His interview published in the dispatches of December 5 says: "When I took this case last March I foresaw this plea of guilt." And yet HE SPENT ONE HUNDRED AND

NINETY THOUSAND DOLLARS of laboring men's innocent money TO SECURE AT ANY COST THE ESCAPE OF MEN WHOM HE KNEW TO BE GUILTY OF THIS COARSE, BRUTAL MURDER—a murder which has been universally condemned by labor unions and all other classes from the Atlantic to the Pacific as placing its perpetrators beyond the limit of sympathy or protection.

Is this what the right of defense by counsel means? If so, then there is something rotten in the principle. It is useless to befog the issue by asking: May not a counsel act for a client whom he believes to be guilty? Of course he may; the best professional traditions agree to that, and no argument for or against it matters here. Nor do we assume here that Clarence Darrow was privy to the $4,000 bribe to a juryman; that part would look dark for him if he had the spending of the money in detail, which perhaps he did not. We do not assume that the hundred and ninety thousand dollars was used to bribe anybody. But we do ask whether the counsel's duty and right of securing a fair trial justifies him in setting himself as systematically and persistently as the expenditure of two hundred thousand dollars signifies to secure the acquittal of clients whom he knew from the beginning to be guilty of the worst crime recognized in law and morality alike. That is our question.

We might ask a similar question of the defenders of some of the trust-law accused—the Standard Oil Company or the Packers, for example, because they, too, are spending hundreds of thousands of dollars on their defense. But, in the first place, we do not *know* that their clients are guilty and that counsel knew it. And, in the second place, there is at least a section of public opinion which sees no moral or legal wrong in the class of acts charged against them. And that is why the McNamara case brings out the issue beyond cavil. *"Murder is Murder,"* in Theodore Roosevelt's words. And, as the American people are neither Thugs nor Machiavellis, and therefore all agree with Theodore Roosevelt on that point (if no other), we come back to our proposition: That Clarence Darrow, acting as counsel under the law, systematically spent one hundred and ninety thousand dollars to extricate from justice men whom he knew to be guilty of the most atrocious crime in the calendar.

Does our system allow this? How can he defend it? How can he defend *himself?* As we figure it, he *must* defend himself—or be recognized no longer in the ranks of an honorable profession.

We think the issue had better be threshed out. He is already on record, voluntarily, in his pamphlet, "Resist Not Evil," with principles which need defending. And in his published interview of December

6 we find its echoes. "The boys," he said, "are *not murderers at heart;* they thought they were just fighting a battle between capital and labor." There you have it, the doctrine of the Hindu thugs revived; that murder is not murder at heart, if you do it on behalf of some cause you believe in. What the public now needs to know plainly is, whether there is any lawyer or class of lawyers, now allowed in our courts, who sympathize sincerely with this thug doctrine and will do anything to save its followers. Let us air this whole issue before public opinion. Let Clarence Darrow, or any one else who believes it, avow it and defend it. If our criminal system is being administered today by an appreciable number of able and intelligent lawyers who hold that view, let us all know it. Public opinion will then take a hand and settle the issue. If it can stand that doctrine, so be it. If the public verdict repudiates it, then let some measure be taken for eliminating its adherents from the ranks of the bar, and for making the defense of accused persons an occupation consistent with self-respect and the service of justice.

JOHN H. WIGMORE.

JUDICIAL DISCRETION VERSUS LEGISLATION IN DETERMINING DEFENDANTS SUITABLE FOR PROBATION.

The Illinois adult probation law, which went into effect this summer, limits the scope of the system to a relatively small number of offenses. It does not apply to larceny, embezzlement, burglary or attempted burglary in any place of habitation, violations of municipal ordinances which are not also violations of state laws, and various other offenses. A number of states, especially in their original enactments, have restricted probationary treatment in cases of adults to so-called first offenders and those convicted of minor offenses. Certain states have authorized the placing of felons on probation, but have specially exempted from its benefits those convicted of particular felonies like rape. The laws of other states, on the other hand, leave the classes of offenders to whom probation may be allowed, almost wholly to judicial discretion.

Thus far only a few over twenty states have passed adult probation laws—fewer than half the number that have authorized the use of probation for children. During the next few years a number of states, and Congress, too, it is hoped, will enact statutes for probation in adult cases. It is pertinent, therefore, to inquire what should be the policy of future legislation with reference to restricting the field of probation in cases of adult offenders.

It is only natural and proper that the legislators of any state, espe-